Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

Vol. 15 JULY 8, 1981 No. 27

This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 81–171)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: June 18, 1981

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
Aeronaves de Mexico, S.A., 500 Fifth Ave., New York, NY; Boston Old Colony Ins. Co. D 6/30/79	May 7, 1974	June 26, 1974	Jamaica, NY $100,000
Aeronaves de Mexico, S.A., 8390 N.W. 53rd St., Miami, Fla.; National Union Fire Ins. Co.	Sept. 29, 1980	Jan. 8, 1981	Miami, FL $100,000

The foregoing principal has not been designated as a carrier of bonded merchandise.

BON–3–01

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 81–172)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York,

pursuant to Section 522(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 81–82 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
June 1, 1981	$0.060901
June 2, 1981	.059701
June 3, 1981	.059916
June 4, 1981	.059102
June 5, 1981	.058411
Belgium franc:	
June 1, 1981	$0.026295
June 2, 1981	.025900
June 3, 1981	.025940
June 4, 1981	.025426
June 5, 1981	.025387
Brazil cruzeiro:	
June 1–5, 1981	$0.011597
People's Republic of China yuan:	
June 1, 1981	$0.572082
June 2–3, 1981	.569249
June 4, 1981	.565867
June 5, 1981	.561388
Denmark krone:	
June 1, 1981	$0.136295
June 2, 1981	.134771
June 3, 1981	.134120
June 4, 1981	.131579
June 5, 1981	.131320
Finland markka:	
June 1, 1981	$0.229226
June 2, 1981	.226603
June 3, 1981	.226655
June 4, 1981	.223964
June 5, 1981	.222321
France franc:	
June 1, 1981	$0.180034
June 2, 1981	.178174
June 3, 1981	.179211
June 4, 1981	.176149
June 5, 1981	.175131

Germany deutsche mark:	
June 1, 1981	$0.428266
June 2, 1981	.421763
June 3, 1981	.423639
June 4, 1981	.414250
June 5, 1981	.414766
Ireland pound:	
June 1, 1981	$1.5700
June 2, 1981	1.5510
June 3. 1981	1.5525
June 4, 1981	1.5245
June 5, 1981	1.5100
Italy lira:	
June 1, 1981	$0.000862
June 2, 1981	.000853
June 3, 1981	.000852
June 4, 1981	.000830
June 5, 1981	.000825
Japan yen:	
June 1, 1981	Quarterly
June 2, 1981	$0.004467
June 3, 1981	Quarterly
June 4, 1981	.004417
June 5, 1981	.004390
Netherlands guilder:	
June 1, 1981	$0.385356
June 2, 1981	.379867
June 3, 1981	.381025
June 4, 1981	.371195
June 5, 1981	.372439
New Zealand dollar:	
June 3, 1981	$0.8655
June 4, 1981	.8532
June 5, 1981	.8495
Norway krone:	
June 1, 1981	$0.174155
June 2, 1981	.172340
June 3, 1981	.171674
June 4, 1981	.169062
June 5, 1981	.167084

Portugal escudo:	
June 1, 1981	$0.016260
June 2, 1981	.016000
June 3, 1981	.016051
June 4, 1981	.015588
June 5, 1981	.015674
Republic of South Africa rand:	
June 1, 1981	$1.1795
June 2, 1981	1.1725
June 3, 1981	1.1655
June 4, 1981	1.1567
June 5, 1981	1.1440
Spain peseta:	
June 1, 1981	$0.010858
June 2, 1981	.010672
June 3, 1981	.010693
June 4, 1981	.010532
June 5, 1981	.010417
Sweden krone:	
June 1, 1981	$0.201898
June 2, 1981	.200300
June 3, 1981	.199362
June 4, 1981	.196502
June 5, 1981	.195580
Switzerland franc:	
June 1, 1981	$0.481696
June 2, 1981	.475737
June 3, 1981	.478469
June 4, 1981	.466418
June 5, 1981	.468384
United Kingdom pound:	
June 1, 1981	$2.0575
June 2, 1981	2.0360
June 3, 1981	2.0160
June 4, 1981	1.9400
June 5, 1981	1.9300

(LIQ-03-01 O:C:E)

Date:_____

KENNETH A. RICH,
Chief,
Customs Information Exchange.

(T.D. 81–173)

Tuna Fish—Tariff-Rate Quota

The tariff-rate quota for the calendar year 1981, on tuna classifiable under item 112.30, Tariff Schedules of the United States (TSUS).

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for calendar year 1981.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 112.30 (TSUS), is based on the U.S. pack of canned tuna during the preceding calendar year.

EFFECTIVE DATES: The 1981 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1981.

FOR FURTHER INFORMATION CONTACT: William D. Slyne, Chief, Special Operations Branch, Duty Assessment Division, Office of Commercial Operations, U.S. Customs Service, Washington, D.C. 20229 (202–566–8592).

It has now been determined that 104,355,000 pounds of tuna may be entered for consumption or withdrawn from warehouse for consumption during the calendar year 1981 at the rate of 6 per centum ad valorem under item 112.30, TSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 per centum ad valorem under item 112.34 of the tariff schedules.

(QUO–2–O:D:S:Q GH)

Dated: June 23, 1981.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

(T.D. 81–174)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 81–82 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to

convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
June 8, 1981	$0.058445
June 9, 1981	.059137
June 10, 1981	.059382
June 11, 1981	.058754
June 12, 1981	.058893
Belgium franc:	
June 8, 1981	$0.025523
June 9, 1981	.025491
June 10, 1981	.025800
June 11, 1981	.025471
June 12, 1981	.025556
Brazil cruzeiro:	
June 8–12, 1981	$0.011346
People's Republic of China yuan:	
June 8–9, 1981	$0.561388
June 10–11, 1981	.563634
June 12, 1981	.561388
Denmark krone:	
June 8, 1981	$0.131666
June 9, 1981	.132363
June 10, 1981	.134138
June 11, 1981	.132380
June 12, 1981	.132670
Finland markka:	
June 8, 1981	$0.221631
June 9, 1981	.223164
June 10, 1981	.224744
June 11, 1981	.223264
June 12, 1981	.222841
France franc:	
June 8, 1981	$0.176367
June 9, 1981	.175039
June 10, 1981	.177715
June 11, 1981	.175331
June 12, 1981	.174825
Germany deutsche mark:	
June 8, 1981	$0.415800
June 9, 1981	.416146
June 10, 1981	.421585
June 11, 1981	.415887
June 12, 1981	.417537

Ireland pound:	
June 8, 1981	$1.5170
June 9, 1981	1.5160
June 10, 1981	1.5385
June 11, 1981	1.5190
June 12, 1981	1.5230
Italy lira:	
June 8, 1981	$0.000830
June 9, 1981	.000835
June 10, 1981	.000845
June 11, 1981	.000835
June 12, 1981	.000837
Japan yen:	
June 8, 1981	$0.004388
June 9, 1981	.004384
June 10, 1981	.004436
June 11, 9181	.004423
June 12, 1981	.004461
Netherlands guilder:	
June 8, 1981	$0.372162
June 9, 1981	.374111
June 10, 1981	.378931
June 11, 1981	.373972
June 12, 1981	.375235
New Zealand dollar:	
June 8, 1981	$0.8516
June 9, 1981	.8526
June 10,1981	.8555
June 11, 1981	.8530
June 12, 1981	.8531
Norway Krone:	
June 8, 1981	$0.167504
June 9, 1981	.167997
June 10, 1981	.169722
June 11, 1981	.167856
June 12, 1981	.168138
Portugal escudo:	
June 8, 1981	$0.015723
June 9, 1981	.015848
June 10, 1981	.015835
June 11, 1981	.015798
June 12, 1981	.015785

Republic of South Africa rand:	
June 8, 1981	$1.1460
June 9, 1981	1.1478
June 10, 1981	1.1527
June 11, 1981	1.1493
June 12, 1981	1.1470
Spain peseta:	
June 8, 1981	$0.010444
June 9, 1981	.010479
June 10, 1981	.010530
June 11, 1981	.010454
June 12, 1981	.010471
Sweden krone:	
June 8, 1981	$0.196657
June 9, 1981	.196464
June 10, 1981	.198216
June 11, 1981	.195886
June 12, 1981	.196348
Switzerland franc:	
June 8, 1981	$0.472813
June 9, 1981	.473485
June 10, 1981	.478927
June 11, 1981	.472813
June 12, 1981	.477099
United Kingdom pound:	
June 8, 1981	$1.9400
June 9, 1981	1.9405
June 10, 1981	1.9705
June 11, 1981	1.9490
June 12, 1981	1.9570

(LIQ-03-01 O:C:E)

Dated: June 12, 1981.

KENNETH A. RICH,
Chief,
Customs Information Exchange.

(T.D. 81-175)

Cotton Textile Products—Restriction on Entry

Restriction on entry of cotton textile products manufactured or produced in Macau

There is published below a directive of May 1, 1981, received by the Commissioner of Customs from the Acting Chairman, Committee

for the Implementation of Textile Agreements, concerning restriction on entry of cotton textile products in categories 333/334/335 manufactured or produced in Macau. This directive amends, but does not cancel, that Committee's directive of December 8, 1980 (T.D. 81–128).

This directive was published in the Federal Register on May 8, 1981 (46 FR 25678), by the Committee.

(QUO–2–1)

Dated: June 23, 1981.

WILLIAM D. SLYNE
(For Richard R. Rosettie, Acting Director,
Duty Assessment Division).

U.S. DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,
Washington, D.C., *May 1, 1981.*

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury, Washington, D.C.

DEAR MR. COMMISSIONER: On December 8, 1980, the Chairman, Committee for the Implementation of Textile Agreements, directed you to prohibit entry during the twelve-month period beginning on January 1, 1981 and extending through December 31, 1981 of cotton, wool and man-made fiber textile products, produced or manufactured in Macau, in excess of designated levels of restraint. The Chairman further advised you that the levels of restraint are subject to adjustment.[1]

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of November 29 and December 18, 1979, as amended, between the Governments of the United States and Portugal; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on May 1, 1981 and for the twelve-month period beginning on January 1, 1981 and extending through December 31, 1981, entry into the

[1] The term "adjustment" refers to those provisions of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of November 29 and December 18, 1979, as amended, between the Governments of the United States and Portugal, which provide, in part, that: (1) within the aggregate and group limits; specific levels of restraint may be exceeded by designated percentages; (2) these levels may also be increased for carryover and carryforward up to 11 percent of the applicable category limits; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement.

United States for consumption and withdrawal from warehouse for consumption of cotton textile products in Category 333/334/335, produced or manufactured in Macau, in excess of the following adjusted level of restaint:

Category	*Amended 12-mo level of restraint* [1]
333/334/335	99,767 dozen of which not more than 47,813 dozen shall be in Cat. 333/335

[1] The levels of restraint have not been adjusted to reflect any imports after December 31, 1980.

The actions taken with respect to the Government of Portugal and with respect to imports of cotton textile products from Macau have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

EDWARD GOTTFRIED,
Acting Chairman, Committee for the Implementation of Textile Agreements.

(T.D. 81-176)

Cotton, Wool and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of cotton, wool and manmade fiber textile products manufactured or produced in Macau

There is published below a directive of April 2, 1981, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, concerning visa requirements on entry of cotton, wool and manmade fiber textile products in certain categories manufactured or produced in Macau. This directive amends, but does not cancel, that Committee's directive of August 6, 1973 (T.D. 73-241).

This directive was published in the Federal Register on April 7, 1981 (46 FR 20720), by the Committee.

(QUO-2-1)

Dated: June 23, 1981

WILLIAM D. SLYNE,
(For Richard R. Rosettie, Acting Director,
Duty Assessment Division).

U.S. DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,
Washington, D.C., April 2, 1981.

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury,
Washington, D.C.

DEAR MR. COMMISSIONER: This directive further amends, but does not cancel, the directive of August 6, 1973 from the Chairman, Committee for the Implementation of Textile Agreements, that directed you to prohibit, under specified conditions, entry into the United States for consumption and withdrawal from warehouse for consumption of certain cotton, wool and man-made fiber textile products, produced or manufactured in Macau for which Macau had not issued an appropriate visa. One of the requirements is that each visa include the signature of a Macau official authorized to issue visas.

Effective on April 7, 1981, the directive of August 6, 1973, is further amended to authorize the officials of the Government of Macau named on the enclosed list to issue export visas for cotton, wool and man-made fiber textile products, produced or manufactured in Macau. The list includes all Macau officials currently authorized to issue export visas.

The actions taken with respect to the Government of Portugal and with respect to imports of cotton, wool and man-made fiber textile products from Macau have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,
Chairman, Committee for the
Implementation of Textile Agreements.

Enclosure.

Macau Officials Authorized To Issue Visas for Cotton, Wool, and Man-Made Fiber Textile Products Exported to the United States

Florinda de Rosa Silva Chan

Angelo Bemdito Galdino Dias

Jose Bernardino Marques Ferreira

349-002 O - 81 - 2

Francisco Xavier Jose de Mesquita

Jose Carlos Mesquita

Rui Manuel Barata Paiva

Joana Maria de Sousa Santos

Maria Manuela Aguiar Viana

(T.D. 81–177)

Cotton and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of cotton and manmade fiber textile products manufactured or produced in India

There are published below directives of March 25, and April 28, 1981, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of cotton and manmade fiber textile products in certain categories manufactured or produced in India. These directives amend, but do not cancel, that Committee's directive of December 16, 1980 (T.D. 81–132).

These directives were published in the Federal Register on March 31, 1981 (46 FR 19513), and May 1, 1981 (46 FR 24617), respectively, by the Committee.

QUO–2–1

Dated: June 23, 1981.

WILLIAM D. SLYNE
(For Richard R. Rosettie, Acting Director,
Duty Assessment Division).

U.S. DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,
Washington, D.C., March 25, 1981.

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury,
Washington, D.C.

DEAR MR. COMMISSIONER: This directive amends, but does not cancel, the directive issued to you on December 16, 1980 by the Chairman of the Committee for the Implementation of Textile Agreements concerning imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in India.

Effective on March 30, 1981, paragraph 1 of the directive of December 16, 1980 is amended to increase the level of restraint for cotton textile products in Category 342 to 84,270 dozen.[1]

The action taken with respect to the Government of India and with respect to imports of cotton textile products from India has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,
Chairman, Committee for the Implementation of Textile Agreements.

U.S. DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,
Washington, D.C., April 28, 1981.

Commitee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury,
Washington, D.C.

Dear Mr. COMMISSIONER: This directive amends, but does not cancel, the directive issued to you on December 16, 1980 by the Chairman of the Committee for the Implementation of Textile Agreements concerning imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in India.

Effective on April 28, 1981, paragraph 1 of the directive of December 16, 1980 is further amended to increase the levels of restraint for cotton and man-made fiber textile products in Categories 335, 351, 359 and 641 to the following:

Category	*Adjusted 12-mo level of restraint*[1]
335	29,056 dozen
351	19,231 dozen
359	326,087 pounds
641	103,448 dozen

[1] The levels of restraint have not been adjusted to reflect any imports after December 31, 1980.

The actions taken with respect to the Government of India and with respect to imports of cotton and man-made fiber textile products

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[1] The level of restraint has not been adjusted to reflect any imports after December 31, 1980.

from India have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,
Chairman, Committee for the
Implementation of Textile Agreements.

ERRATUM

In Customs Bulletin, Volume 15, No. 22, in T.D. 81–146, on page 2, Edwards Trucking Inc., change date of discontinuance to February 21, 1981.

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. No. 1264)

CARLINGSWITCH *v.* UNITED STATES, No. 80–41

1. GRANT OF SUMMARY JUDGMENT—LACK OF JURISDICTION.

Judgment of United States Court of International Trade, 85 Cust. Ct. —, C.D. 4873, 500 F. Supp. 223 (1980), granting the United States' motion for summary judgment on the ground that the court lacked jurisdiction and denying Carlingswitch's cross-motion for summary judgment, affirmed.

2. ID.—REFUSAL TO REFUND IS NOT "CHARGE OR EXACTION".

After appellant paid $91,992.35 to Customs as "additional tariff" and "withheld duties" and was subsequently charged $7,926,778 forfeiture value for undervaluation of imported merchandise, false freight figures, and failure to report true constructed value figures, the claim was remitted in its entirety because statute of limitations had run; summary judgment based upon want of jurisdiction upheld on ground that refusal to refund $91,992.35 under 19 U.S.C. 1520(a)(3) is not a "charge or exaction" as those words are used in 19 U.S.C. 1514(a)(3) which would give the court jurisdiction under 28 U.S.C. 1582(a)(3).

3. ID.

It is refusal to refund which appellant alleges to be "charge or exaction," not actual payments made to Customs (otherwise it would have been argued that money should have been refunded pursuant to 19 U.S.C. 1520(a)(2), which relates to "Fees, charges, and exactions"), and judgment of lower court is affirmed based upon its holding that a refusal to refund money is not a § 1514 "charge or exaction."

4. ID.

CCPA disagrees that money should have been refunded pursuant to 19 U.S.C. 1520(a)(3), which refers to monies paid "on account of a fine, penalty, or forfeiture," none of which had been charged against appellant at the time of the payments in question.

5. ID.—VOLUNTARY DISCLOSURE PRACTICE OF CUSTOMS SERVICE.

Because appellant argues that its payments were not "voluntary and without demand," as lower court stated, and thus were not

made pursuant to "voluntary disclosure" practice of Customs, its attempt to assert that lower court decision may "chill" participation in that program and defeat public policy behind it has no weight; while appellant may not now contest with Customs, as a defendant, the correctness of the imposition of $7,926,778 fine or the underlying undervaluation determination, decision is limited to holding that, based upon appellant's arguments, lower court does not have jurisdiction over the dispute.

CARLINGSWITCH, INC., APPELLANT *v.* UNITED STATES, APPELLEE

(No. 80–41)

United States Court of Customs and Patent Appeals, June 18, 1981, Appeal from United States Customs Court, C.A.D. No. 1264

[Affirmed]

Charles P. Deem, attorney for appellant.

Thomas S. Martin, Acting Assistant Attorney General, *David M. Cohen*, Director, *Joseph I. Liebman*, Attorney in charge, *Jerry P. Wiskin*, attorneys for appellee.

[Oral argument on April 6, 1981 by *Charles P. Deem* for appellant and *Jerry P. Wiskin* for appellee.]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, MILLER, and NIES, *Associate Judges*.

RICH, *Judge*.

[1] This appeal is from the judgment of the United States Customs Court (now the United States Court of International Trade) in *Carlingswitch, Inc.* v. *United States*, 85 Cust. Ct. —, C.D. 4873, 500 F. Supp. 223 (1980), granting the United States' motion for summary judgment and denying Carlingswitch's cross-motion for summary judgment. We affirm.

This apparently being a case of first impression, we devote substantial discussion to its background and to elucidation of the arguments of both parties.

BACKGROUND

[2] Appellant was under investigation in 1974 for allegedly understating the actual costs of certain electrical articles assembled in Mexico from United States products and subsequently imported into the United States. On May 28, 1974, Carlingswitch, through its accountants, voluntarily and without demand paid $41,992.35 to the United States Customs Office in Brownsville, Texas, stating that the funds represented "additional tariff." On April 23, 1976, Carlingswitch, through its attorneys, paid the Customs Service an additional $50,000, designated as "withheld duties," stating;

> This tender is not to be interpreted as an admission that any particular additional duties are due, that fact not having yet been determined by us. Rather, the tender is made in the spirit

of demonstrating our client's intentions to cooperate fully with your office with respect to the fulfillment of its recognized obligation under the law to pay appropriate duty on its importations.

The trial court stated it to be "undisputed" that the payments were made pursuant to the Customs Service "voluntary disclosure" practice. That practice, now embodied in 19 CFR 171.1(a), is briefly, that a voluntary disclosure of violations of the customs laws, accompanied by a deposit of an amount equal to the total loss of revenue to the government will, in specified circumstances, result in mitigation of the penalty to an amount not exceeding the government's total loss of revenue.

Customs subsequently completed its investigation of appellant and on January 6, 1977, demanded $7,926,778 as forfeiture value on the basis of (1) the undervaluation of the merchandise; (2) false freight figures; and (3) the failure to report the true constructed, value figures. Customs notified appellant on June 15, 1979, however that the statute of limitations had run out and that the claim was remitted in its entirety. Appellant requested a refund on June 29, 1979, of the $91,992.35 it had paid. That request was denied by Customs which which stated that although the statute of limitations had run on the claimed money, the actual revenue loss to the government was $174,573.21, and it assumed that appellant's voluntary payments were made to cover part of that loss. Appellant filed a protest on October 22, 1979, against this refusal to refund the money, which protest was denied on December 11, 1979. This suit followed.

THE TRIAL COURT OPINION

Carlingswitch contended below that by virtue of 19 USC 1520(a)(3),[1] which relates to refunds, Customs' refusal to refund the monies paid amounted to a "charge or exaction" within the meaning of 19 USC 1514(a)(3).[2] It further argued that the trial court therefore

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[1] 19 U.S.C. 1520(a)(3) provides in part:

(a) The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

* * * * * * *

(3) Fines, penalties, and forfeitures—Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or is remitted.

[2] 19 U.S.C. 1514 reads in part:

(a) Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties as defined in section 1677(9) (C), (D), and (E) of this title), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

* * * * * * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

had jurisdiction over the dispute pursuant to 28 USC 1582,[3] and that its cross-motion for summary judgment should be granted. The government, of course, argued otherwise, and had previously moved for summary judgment in its favor.

The motion by the government was granted. In support of its decision that it lacked jurisdiction over the case, the trial court cited a number of dictionary definitions of the word "exaction," concluding that some element of demand or compulsion is necessary for a payment to have been "exacted." The court further noted that past cases have utilized the term only with regard "to actual assessments of specific sums of money." *Alberta Gas Chemicals, Inc.* v. *Blumenthal*, 82 Cust. Ct. 77, 81–2, C.D. 4792, 467 F. Supp. 1245, 1249–50 (1979). Accordingly, the court declined to extend the meaning of the word "exaction" to include a refusal to refund money voluntarily paid. The trial court noted, finally, that an appropriate district court, rather than it, had jurisdiction in this type of case (a "penalty case") pursuant to 19 USC 1592, citing *Sheldon & Co.* v. *United States*, 8 Cust. Ct. Appls. 215, 218, T.D. 37455 (1917); *M. M. Scher & Sons, Inc.* v. *United States*, 24 Cust. Ct. 243, C.D. 1241 (1950); and the Senate Finance Committee Report on H.R. 8149, the Customs Procedural Reform and Simplification Act of 1978 (S. Rep. No. 95–778, 95th Cong., 2d Sess. 17–21).

APPELLANT'S ARGUMENTS

Appellants states that the only issue before us "is whether protests will lie against an administrative decision under 19 U.S.C. 1520(a)(3)." In support of its case, appellant asserts that the Court of International Trade, rather than "an appropriate district court," has jurisdiction over the case because it is not a "penalty case" as that term is typically employed. The usual penalty case is one brought by the government in a district court pursuant to 19 USC 1604 and 28 USC 1355 to enforce a claim under 19 USC 1592 or some related statute, or a case arising under 19 USC 1608. In this case, the penalty has been mooted and there is no issue relating to the merits of the penalty claim.

Appellant contends that the cases cited by the trial court in support of its decision are inapposite. *M. M. Scher & Sons, Inc.* v. *United States*, supra, it argues, spoke of a "sum arrived at by the Secretary of the Treasury in mitigation of the penalty fixed by law under the

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[3] 28 U.S.C. 1582, which delineates the jurisdiction of the Customs Court (now the Court of International Trade) provides in part:

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all *charges or exactions* of whatever character within the jurisdiction of the Secretary of the Treasury; * * * [Emphasis ours.]

provisions of section 592 of the Tariff Act of 1930," clearly not the case here, and jurisdiction was proscribed in *Sheldon & Co.* v. *United States*, supra, because:

> If the moneys received by the collector were paid to him as a representative of the United States attorney, or in compromise of a threatened suit in forefeiture and not in satisfaction of duties or of a customs fee, charge, or exaction, then no relief can be granted the importers in this proceeding * * *.

Thus, the latter opinion also has no relevance, appellant says, because in this case monies were paid in "satisfaction of duties." The Senate Report relied on by the trial court relates, it is said, only to government suits to enforce penalty claims, "i.e., suits relating to the merits of such claims."

Appellant also asserts that "every other decision under 19 USC 1520 is protestable, and it would seem unlikely that the legislature would have intended that only 1520(a)(3) by singled out for denial of review by the [trial court]." Appellant says that § 1514 should be interpreted broadly to cover such a decision "in one or more of its categories. The courts have not hesitated to so interpret section 1514 when justice has required that review be available." *See e.g.*, *United States* v. *C. J. Tower & Sons of Buffalo, Inc.*, 61 CCPA 90, C.A.D. 1129, 499 F. 2d 1277 (1974).

Additionally, appellant argues that, although the trial court felt it was "undisputed," the payment of money was not made pursuant to the "voluntary disclosure" practice. The initial deposit was made only after a Customs audit "disclosed" alleged duty deficiences and payment was demanded. The second deposit was made after a formal investigation was commenced, thus negating "voluntary disclosure" under the Customs Regulations referenced by the trial court. As further support for this conclusion, appellant notes that there "is nothing in the letters accompanying the deposits reflecting any disclosure of of violation of 19 U.S.C. 1592."

In any event, even if the deposits were made pursuant to "voluntary disclosure," appellant contends they were obviously deposited "on account of a [potential] penalty" as contemplated by 19 U.S.C. 1520(a)(3). Further, since mitigation of a penalty is dependent upon payment of monies, these must be characterized as "exactions." The word "deposited" in § 1520(a)(3) is not qualified and it must be assumed that it refers to *duties* or *other receipts* deposited on account of penalty. Whether that money is voluntarily tendered or exacted is not made a condition therein.

It is also argued by appellant that the deposits in this case may be charged as duties as that term is used in 19 U.S.C. 1514(a)(2).

349-002 O - 81 - 3

Lastly, appellant questions what would happen in a case where money was tendered pursuant to a voluntary disclosure and Customs subsequently found no violation. Does not Customs have the authority to refund the voluntary deposit under 19 U.S.C. 1520(a)(3)?

APPELLEE'S ARGUMENTS

The government argues that we should adopt the decision of the trial court that a refusal to refund monies voluntarily deposited does not constitute a "charge or exaction" under 19 U.S.C. 1514(a)(3). In addition to repeating the court's reasoning, appellee states that it has been held that customs duties are outside the scope of § 1514 (a)(3) and that a demand for payment of duties found due is not an exaction under which a 1514 protest may be filed. If this is so, then neither can a tender labeled as "withheld duties" be a protestable "exaction."

Further, 19 U.S.C. 1520(a)(2) specifically provides for refunds of "fees, charges, or exactions, *other than duties and taxes* * * *." Congress thus clearly did not intend that customs duties be considered a charge or exaction. This distinction in § 1520 between duties and charges or exactions should apply with equal force to § 1514.

The government says the inference by appellant that the monies were deposited on the basis of an underlying demand by the Customs Service, i.e., that they were deposited on account of a fine, penalty or forfeiture, is erroneous. In an affidavit, William F. Burns, Director of Classification and Value for the Customs District of Laredo, Texas, stated, "At the time the above monies were tendered, there was no fine, penalty, or forfeiture asserted against Carlingswitch, Inc., although the question of the proper duties owed by that firm was a matter under investigation over a period of time, resulting in the subsequent assessment of a penalty * * * on January 6, 1977, in the amount of $7,926,778.00." Accordingly, appellee concludes that both payments by appellant were completely voluntary and without demand. The remission of the subsequent penalty did not alter the fact that the payments in issue were tendered as "withheld duties" to ensure that the government was not deprived of its rightful duties, and in no way inferred that Customs believed an underpayment had not occurred.

Additionally, appellee asserts that appellant's characterization of the payments as "duties" constitutes an admission that the payments were not "exactions," "charges" or "money deposited on account of fine, penalty, or forfeiture," although appellant seems to want it both ways. Appellee concludes that:

> In any event, the holding of the trial court that this was a "penalty case" is not crucial to the outcome of this appeal. The

holding of the court was essentially the predicate upon which the denial of appellant's motion to amend its complaint was based. It is uncontroverted that appellant's payments were completely voluntary and were made without compulsion. Accordingly, the record supports the finding of the trial court that there was no "exaction" within the meaning of Section 514(a)(3), *supra*. It is thus unnecessary to reach the question as to whether this action was a "penalty case" and whether the Court of International Trade had jurisdiction to hear the action on that ground.

OPINION

As related above, appellant argues that although this is not "a penalty case," the deposit given the Customs Service was "on account of a potential penalty" and, thus, falls within the type of "money" referred to in 19 U.S.C. 1520(a)(3). Furthermore, appellant argues that the *refusal* to refund the deposit, paid "in satisfaction of duties," should be characterized as a "charge or exaction" as those words are used in 19 U.S.C. 1514(a)(3).

We agree with the government that the trial court did not have jurisdiction over this dispute under 28 U.S.C. 1582(a)(3) (1977). There would be no purpose in restating the rationale, supra, which leads us, as it did the court below, to conclude that a refusal to refund payments (which allegedly should be refunded pursuant to 19 U.S.C. 1520(a)(3)) does not constitute a "charge or exaction" as that term is used in 19 U.S.C. 1514(a)(3). *Alberta Gas Chemicals, Inc.* v. *Blumenthal*, supra.

[3] Appellant alleges it is in dispute whether these payments were made "voluntarily and without demand," a fact the trial court apparently utilized to hold that there was no "charge or exaction." Edward F. Rosenthal, an attorney for appellant, states in an affidavit that the payments were made only after appellant discovered that it was under investigation and entered into "negotiations with [Customs]." It is the *refusal to refund* which appellant alleges to be a "charge or exaction," however, not the two *payments* made to the Customs Service (otherwise appellant would have argued that the money should be refunded pursuant to 19 U.S.C. 1520(a)(2), which relates to "Fees, charges, and exactions"). That a refusal to refund money is not a § 1514 "charge or exaction" is the basis upon which we affirm the decision granting appellee's motion for summary judgment.

[4] Additionally, we disagree with the theory that the payments made by appellant should have been refunded pursuant to 19 U.S.C. 1520(a)(3). That section refers to monies paid "on account of a fine, penalty, or forfeiture," none of which had been charged against

appellant at the time of the payments in question. The monies were deposited as "additional tariff" and as "withheld duties" to *alleviate* any *potential* penalty. The two concepts are not equivalent.

In support of its conclusion that it did not have the authority to hear this dispute, the trial court stated this to be a "penalty case" over which the federal district courts have exclusive jurisdiction, citing 19 U.S.C. 1592. That section, however, is not a jurisdictional statute and we assume the court was referring to 28 U.S.C. 1355, which states:

> 1355. *Fine, penalty or forfeiture*
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

Noting our previous characterization of appellant's payments, we cannot regard these monies as for a "fine, penalty, or forfeiture* * *." Additionally, the Customs Service procedure known as "voluntary disclosure," if that is what appellant's payments may be said to have been paid under, is not one which may properly be labeled as an "Act of Congress." [4]

[5] As a policy matter, appellant posits, "What happens when, for example, the subsequent investigation contemplated by the Regulations results in a determination that no violation has occurred, and no additional duty is due?" In other words, how does one get money back if Customs refuses to refund it?

Notwithstanding that appellant has argued that its payments were *not* pursuant to "voluntary disclosure," it is apparently trying to impress upon us that the decision on appeal may "chill" participation in "voluntary disclosure," thus defeating the public policy behind this procedure, which is to encourage those who have violated the law to disclose such violation and make appropriate restitution to the government. It is true that because the statutory period for collection of the penalty has passed, appellant may not now contest with Customs, *as a defendant*, the correctness of the imposition of that penalty or the underlying undervaluation determination. Our decision, however, is limited to holding that, since appellant's only arguments are that "on account of penalty" in § 1520(a)(3) should be construed to mean "to alleviate any potential penalty," and that the *refusal to refund* monies paid should be characterized as a "charge

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[4] There is some doubt that these monies were submitted pursuant to the "voluntary disclosure" practice of Customs, for appellant did not accompany its payments with a "voluntary disclosure of violations of Customs laws," and both parties acknowledge that appellant was under investigation at the time of the payments. 19 CFR 1711(a).

or exaction" as those terms are used in § 1514(a)(3), with which arguments we disagree, summary judgment was properly entered against appellant by the court below and its judgment is *affirmed.*

(C.A.D. 1265)

WAY DISTRIBUTORS, INC. *v.* UNITED STATES

1. CLASSIFICATION—EXPANDED RUBBER FOR SHOE SOLES

Court of International Trade decision sustaining classification of sheets of rubber used for making shoe soles as expanded rubber under item 770.80, TSUS, affirmed.

2. ID.

Presence of expansion, in and of itself, regardless of the method or manner by which it is detected, makes product classifiable as expanded rubber.

3. ID.

Absence of an industry standard of magnification to detect expansion does not demonstrate 30 diameters magnification test adopted by Customs Service results in incorrect classification.

4. PROTECTION OF U.S. INDUSTRY—RIGHT TO REMEDY FOR INJURY, 19 U.S.C. 1516

19 U.S.C. 1516 adds to the protection of U.S. industry by providing domestic manufacturers with the legal right to a remedy for injury resulting from incorrect appraisement or classification of imported merchandise.

5. ID.

Congress did not intend to sever the informal links of communication that traditionally have existed between U.S. industry and Government by enactment of 19 U.S.C. 1516.

WAY DISTRIBUTORS, INC., APPELLANT, *v.* UNITED STATES, APPELLEE

No. 81-2

United States Court of Customs and Patent Appeals, June 18, 1981,
Appeal from United States Customs Court, C.A.D. No. 1265

[Affirmed]

Walter E. Doherty, Jr. and *Williams E. Melahn,* attorneys for appellant.

Thomas S. Martin, Acting Assistant Attorney General, *David M. Cohen,* Director, *Joseph I. Liebman,* Attorney in charge, *Jerry P. Wiskin,* for appellee.

David R. Ostheimer and *Sidney H. Kuflik,* Amicus Curiae.

[Oral argument on May 4, 1981 by *William E. Melahn,* for appellant and *Jerry P. Wiskin* for appellee.]

Before MARKEY, *Chief Judge,* RICH, BALDWIN, MILLER, and NIES, *Associate Judges.*

NIES, *Judge*.

[1] This appeal is from the judgment of the United States Customs Court (now the United States Court of International Trade), — Cust. Ct. — C.D. 4870 (1980), sustaining the classification of appellant's goods as expanded rubber. We affirm.

BACKGROUND

Appellant imported sheets of rubber, which are used in making shoe soles, from West Germany in 1972 and 1974.

The importations were classified as "expanded rubber" under item 770.80 of the Tariff Schedules of the United States (TSUS).[1] Appellant contends the products are "semi-expanded" not "expanded" and, therefore, should properly be classified as rubber sheets under item 771.42, TSUS,[2] or, alternatively, as rubber articles not specially provided for under item 774.60, TSUS.[3]

Appellant also asserted that Ruling 202–71 of the Office of Regulations and Rulings (ORR), issued May 12, 1971, upon which the disputed classification was based, was put into effect in violation of the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. 553, and without affording appellant the safeguards of section 516 of the Tariff Act of 1930, 19 U.S.C. 1516.

The Court of International Trade found appellant's goods, which the evidence showed were expanded by means of a blowing agent, albeit to a lesser degree than some forms of expanded rubber, were properly classified.[4] The court rejected appellant's contention that where expansion could be detected only with magnification, and particularly 30 power magnification, such products are commercially different from the expanded rubber products (e.g., sponge rubber) classifiable under item 770.80, TSUS.

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[1] Schedule 7, Part 12, Subpart A:
Expanded, foamed, or sponge rubber or plastics, and articles not specially provided for wholly or almost wholly of such rubber or plastics:
* * * * * * *
Flexible:
* * * * * * *
770.80 Other ..... 12.5% ad val.

[2] Schedule 7, Part 12, Subpart C:
Films, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics:
* * * * * * *
Not of cellulosic plastics materials:
Film strips, and sheets, all of the foregoing which are flexible:
* * * * * * *
771.42 Other ..... 6% ad val.

[3] Schedule 7, Part 12, Subpart D:
Articles not specially provided for, of rubber or plastics:
* * * * * * *
774.60 Other ..... 8.5% ad val.

[4] Expansion of rubber is accomplished by the use of a blowing agent, such as azodicarbonamide, during production which increases the volume and results in the formation of closed cell structure.

Addressing the procedural issues raised by appellant, the court below held that ORR Ruling 202–71, which established a standard of microscopic enlargement of 30 diameters for the detection of expansion in rubber, is an "interpretative rule" which defines the agency's understanding of item 770.80, TSUS. Such rulings are specifically exempted from the notice and participation requirements of 5 U.S.C. 553. The court also held that section 516 of the Tariff Act of 1930, which allows American manufacturers to complain and seek to change the classification of imported merchandise, does not establish the sole manner in which an interested party may communicate its views to Customs. Thus, there was no impropriety in issuing ORR Ruling 202–71 as a result of a letter from counsel for the Rubber Manufacturers Association, Inc. (RMA) concerning the classification of appellant's merchandise.

OPINION

Turning first to the classification issue, we agree with the court below that the imported products, which appellant characterizes as "semi-expanded," are "expanded" within the meaning of item 770.80, TSUS, and that appellant failed to prove error in the Customs Service's use of a 30 diameters magnification standard in order to detect expansion.[5] The plain language of the tariff provision makes it encompass all expanded rubber without regard to various degrees of expansion. A product either is or is not expanded. Thus, appellant's product, which contains an effective blowing agent, *is* expanded for tariff purposes. Moreover, the tariff schedule is not directed toward the manner in which such expansion is or can be detected. **[2]** Presence of expansion, in and of itself, regardless of the method or manner by which it is detected, makes it classifiable as expanded rubber. **[3]** The absence of an industry standard of magnification to detect expansion does not demonstrate that the test adopted by the Customs Service results in incorrect classification.[6]

Turning to the procedural issues, appellant has expressly abandoned

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[5] Appellant's assertion that at 30 diameters magnification an observer cannot discriminate between a cross-section of steel and a cross-section of rubber is irrelevant and unsupported. The photograph referenced by appellant depicts not a cross-section of steel, but rather the surface of a sheet of 32 gauge cold rolled steel after it was sand blasted. That pitting inflicted on a surface can be observed with 30 diameters magnification does not indicate that cellular structure of steel can be observed under such magnification, or that such magnification is improper for detecting cellular structure in rubber. Appellant proffers no basis for rejecting a 30 diameters magnification standard other than there being "no magnification test recognized by the Rubber Industry for determining expansion of rubber."

[6] Appellant contends that the Customs Service should determine whether an article is expanded by performing a series of tests consisting of not only visual, naked eye inspection of the cellular structure of the rubber, but also determination of its hardness by a Shore A hardness test, and its specific gravity.

Testimony below clearly indicates that the specific gravity of the imported article is not determinative of whether the article is expanded, and that the Shore A hardness test has no bearing on such determination. Accordingly, such additional tests are inappropriate.

its assertion that ORR Ruling 202–7 was issued in violation of the Administrative Procedure Act, and relies solely on purported violations of section 516 of the Tariff Act of 1930.[7] Accordingly, we need only address the § 516 issue, which appellant argues was not adequately considered below.

Appellant contends that a June 3, 1970 letter from RMA's attorneys to the Customs Service must be construed as a defective complaint under § 516; that RMA had no standing to file such a complaint because it is a trade association; that ORR Ruling 202–71 issued as a result of that letter;[8] that ORR Ruling 202–71 was issued in violation of § 516 because the ruling was based on a complaint filed by a party having no standing to file such a complaint; that the publication and 30-day grace period requirements of § 516 were ignored; and that, consequently, classification in item 770.80, TSUS, is "null and void and of no effect."[9]

Appellant contends that the court below failed to discuss these issues. Moreover, appellant contends that "any attempt to secure a classification ruling by domestic interests, which circumvents

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[7] In pertinent part, 19 U.S.C. 1516 in effect on June 3, 1970, read as follows:

§ 1516. Appeal or protest by American procedures * * *.

(b) Classification. The Secretary of the Treasury shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification of, and the rate of duty, if any, imposed upon, designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the proper rate of duty is not being assessed, he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief. If the Secretary decides that the classification of, or rate of duty assessed upon, the merchandise is not correct, he shall notify the collectors as to the proper classification and rate of duty and shall so inform the complainant, and such rate of duty shall be assessed upon all such merchandise entered for consumption or withdrawn from warehouse for consumption after thirty days after the date such notice to the collectors is published in the weekly Treasury Decisions. If the Secretary decides that the classification and rate of duty are correct, he shall so inform the complainant. If dissatisfied with the decision of the Secretary, the complainant may file with the Secretary, not later than thirty days after the date of such decision, notice that he desires to protest the classification of, or rate of duty assessed upon, the merchandise. Upon receipt of such notice from the complainant, the Secretary shall cause publication to be made of his decision as to proper classification and rate of duty and of the complainant's desire to protest, and shall thereafter furnish the complainant with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at the port of entry designated by the complainant in his notice of desire to protest, as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port. * * *

Section 516 was amended by Pub. L. 91-271 enacted June 2, 1970, effective October 1, 1970, but to be retroactively applied in some instances. The parties do not argue that this amendment affects the issues raised here.

[8] The Customs Service responded to RMA by letter dated March 25, 1971, advising that a Customs' laboratory report indicated the samples furnished by RMA were synthetic rubber which had been foamed or expanded to a slight degree; that in Treasury Decision (T.D.) 56484(36) [sic, (86)] certain other rubber soling material, also from West Germany, was found to be expanded and classifiable under item 770.80, TSUS, and that the samples are properly classifiable under the same item; and that the presence of a blowing agent is not sufficient in and of itself to result in an article being classifiable under the provisions for expanded rubber, but rather the article must have a cellular expanded constitution, which is detected by microscopic examination of a cross-section of the article using an enlargement of 30 diameters.

This letter was distributed to all Customs officers on May 12, 1971, under the identifying number ORR 202-71, in order that such merchandise would be uniformly classified at all ports. Appellant's earliest entries effected by the ruling were made the following year.

[9] RMA, as amicus curiae before this court, asserts that its June 3, 1970 letter was not intended to be, and could not have been, a § 516 complaint; that prior to a complaint being filed, § 516 requires the submission of a written classification request; that § 516 does not require publication of either the written classification request or Customs' response thereto; and that the June 3, 1970 letter can, at most, be construed as the written classification request which precedes the filing of a complaint.

Section 516 * * *, must be stricken down as wholly improper, illegal, and void." While acknowledging the Customs Service may on its own initiative make interpretative rulings, appellant would deprive Customs of this authority where a ruling results from information brought to its attention informally by interested parties.

The court below rejected appellant's contentions under § 516, stating:

> In making [interpretative ruling ORR Ruling 202–71, the Customs Service] was not required to consult plaintiff nor was it required to avoid communication with those advocating an Interpretation adverse to plaintiff. Interested parties may communicate their views to the agency at any time and in any manner not inconsistent with statute or law. The existence of Section 516 of the Tariff Act of 1930, which allows an American Manufacturer to complain and seek to change the classification of imported merchandise does not mean that Section 516 is the only permissible way for American Manufacturers to attempt to bring about a change in import classification. Such a restrictive view finds no support in law or legislative history.

We agree. **[4]** Section 516 adds to the protection of U.S. industry by providing domestic manufacturers with the legal right to a remedy for injury resulting from incorrect appraisement or classification of imported merchandise. **[5]** Appellant refers repeatedly to the legislative history of the section but fails to provide even a suggestion from such references that through enactment of § 516 Congress intended to sever the informal links of communication that traditionally have existed between our industry and Government.[10] When a U.S. manufacturer does resort to § 516 proceedings, the safeguards provided thereunder to an importer become operative. However, those provisions do not deprive the Customs Service of authority to issue an interpretative ruling following informal consultation with representatives of U.S. industry.

Thus, representatives of U.S. rubber manufacturers could properly communicate with Customs Service officers without the ruling resulting from such communication being, as characterized by appellant, "wholly improper, illegal, and void." Accordingly, the Court of International Trade did not need to address the subsidiary issues of appellant's § 516 argument.

CONCLUSION

In view of the foregoing, the judgment of the Court of International Trade upholding classification of appellant's imported sheets of rubber as expanded rubber under item 770.80, TSUS, is *affirmed*.

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[10] For a discussion contrary to appellant's view, see S. Rep. No. 37, 71st Cong., 1st Sess., *reprinted in* 71 Cong. Rec. 3378 (1929) in connection with a proposed amendment of § 516 to give labor the same standing that industry had under § 516.

United States Court of International Trade

Our Federal Plaza
New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Scovel Richardson
Frederick Landis
James L. Watson
Herbert N. Maletz
Bernard Newman
Nils A. Boe

Senior Judge

Samuel M. Rosenstein

Clerk

Josept E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 81–51)

TOYOTA MOTOR SALES (U.S.A.), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–1–00048

Memorandum Opinion

(Dated June 12, 1981)

Cladouhos & Brashares (*Harry W. Cladouhos, William C. Brashares* and *Ellen J. Gleberman* on the brief) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Saul Davis* on the brief) for the defendant.

LANDIS, *Judge:* Defendant moves for an order pursuant to rules 16 and 26(f) of this Court granting a pre-trial conference and/or a discovery conference.

At this juncture issue has been joined and the parties have answered the first set of interrogatories propounded by each other. The motion papers indicate that a motion by plaintiff to compel discovery under rule 37(a) is imminent.

The motion for a pre-trial conference pursuant to rule 16 is premature in this case. The purpose of a pre-trial conference is to facilitate the actual trial of the case. Normally when a case is ready for trial the *parties will have completed discovery, preliminary motions will have been ruled upon* and counsel will be thoroughly familiar with the case which increases the chances of settlement.[1] Some cases may present an exception to the general rule. Under certain circumstances it may be beneficial to hold such a conference where multiple parties are involved and there may be a separation or consolidation of trials or where the conference is directed toward a clearly delineated issue central to the litigation.

In the present case there is insufficient information available to the court for the court to prepare any meaningful guidelines or questions to be posed at such a conference in order to attain the long-range effect of facilitating the actual trial of the matter.

The discovery conference motion pursuant to rule 26(f) is intended to prevent abuse of the discovery procedures. The rule is new not only to this Court but to other federal courts as well having become effective on August 1, 1980. The rule is specific in what must be submitted when a request is made by an attorney for a party. Here, the request is woefully lacking. No proposed plan and schedule of discovery is submitted (26(f)(2)). There is no statement of the issues involved that serve as the basis and purpose of this conference (26(f)(1)). There is no proposed limitation to be placed on the discovery nor any proposed orders with respect to discovery (26(f) (3) and (4)).

Instead, defendant appears to be attacking Count II of plaintiff's complaint. Taken to its logical conclusion, this attack is tantamount to saying that Count II fails to state a claim upon which relief can be granted or that the court lacks subject matter jurisdiction or some other type of dispositive argument properly raised on motion for judgment on the pleadings or summary judgment.

If the defendant feels that on plaintiff's motion to compel major issues may not be determined it can raise said issues by a proper rule 12 motion. The court is willing to assist in formulating a discovery plan provided the parties comply with the statutory frame-

[1] See, *Handbook for Effective Pretrial Procedure*, adopted by the Judicial Conference of the United States (1964), 37 F.R.D. 255, 263.

work. The court will also hear any request for an accelerated briefing period for motions made to compel and any cross-motions thereto. However, the court will not deprive a party of discovery on a dispositive issue merely upon a discovery conference hearing.

Accordingly, defendant's motion pursuant to rules 16 and 26(f) is denied without prejudice to renewal upon compliance with the relevant rules.

(Slip Op. 81–52)

INTER-PACIFIC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT
Court No. 77–1–00044

Footwear

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment denied.]

(Dated June 12, 1981)

Leonard M. Fertman, Professional Corporation (*James W. McDonald* on the brief), for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Jerry P. Wiskin* on the brief), for the defendant.

LANDIS, *Judge:* Pursuant to rule 8.2 plaintiff moves for summary judgment sustaining its claim that certain footwear manufactured in Taiwan and imported into the United States between September and December 1975 should be classified under TSUS item 700.55. Defendant cross-moves for summary judgment sustaining the classification by the customs official under TSUS item 700.60 and, further, for summary judgment overruling plaintiff's claim and dismissing the action.

A review of plaintiff's statement of material facts and defendant's response thereto, as well as the amended pleadings, indicates that there are material issues of fact to be determined upon a trial on the merits which precludes the granting of summary judgment to either party. *The American Greiner Electronic, Inc.* v, *United States*, 77 Cust. Ct. 164, C.R.D. 76–9 (1976); *S.S. Kresge Co.* v. *United States*, 77 Cust. Ct. 154, C.R.D. 76–6 (1976).

The central issue in this case is the composition of the exterior surface area of the upper. Plaintiff claims it to be 100 percent vinyl (Statement of Material Facts, No. 3) while defendant claims otherwise. Before the court can determine the main issue it must first resolve the crucial peripheral issue of what actually constitutes the shoe upper. Once again the parties disagree.

Plaintiff claims that the cotton embroidery sewn on the shoe is not part of the upper because it performs no utilitarian function and

its addition does not make the footwear any more useful than if it were manufactured without the embroidery (Material Fact No. 6). Defendant denies this.

Plaintiff further claims that the stitching is ornamental in character and that ornamental decorations that provide no utilitarian function are disregarded in determining what constitutes the uppers of footwear (Amended Complaint, paragraph 7 and Material Fact No. 7). Defendant also denies this claim.

In support of its motion plaintiff submits affidavits of Frank G. Arnstein and Lewis Jackson. Both affiants agree that the embroidered stitching in issue is purely ornamental serving no utilitarian function and the removal of which would not render the merchandise unserviceable as footwear nor impair the structural soundness thereof. Neither affidavit states whether removal of the stitching would damage the footwear or render it unsalable as footwear.

Defendant submits an affidavit of Irma Rueckert, a chemist for the United States Customs Service, which indicates that the exterior surface area of the upper consists of 77.5 percent plastic and 22.5 percent fibers.

Additionally, the parties have submitted a number of sample shoes with their summary judgment motions.

Examination of the samples submitted raises a strong issue as to whether the sewing is functional or utilitarian to some degree.[1] In examining the samples it appears to the Court that the stitching not only pierces the plastic upper but also pierces the material that acts as a backing to the plastic. In this capacity the sewing may be functional in that it acts as a fastening of the plastic to the backing in addition to the glue used as a fastening agent. It is not beyond peradventure that evidence could be adduced at a trial showing the stitching to be both ornamental and functional. It is further noted that the stitching has created hundreds of tiny perforations and that removal of the stitching might damage or make the shoe unsalable.

It is anticipated that on the trial testimony subjected to the safeguards of cross-examination will be elicited as to what constitutes the upper and the exterior surface area of the upper of the footwear in issue.

Further, the issues of functionality and ornamentation are not satisfactorily settled by the proof submitted on this motion. They constitute a question of fact to be determined with reference to the particular article before the Court. *Overseas Mailman, Inc.* v. *United States*, 83 Cust. Ct. 165, C.R.D. 79–15 (1979).

Accordingly, the motion and cross-motion for summary judgment are denied.

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[1] It is well settled that a sample is a potent witness. *United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T.D. 45995 (1932).

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *June 15, 1981.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P81/88	Rao, J. June 11, 1981	Cal Custom Hawk	79-1-00006	Item 648.97 11% Item 646.42 9.5%	Item 660.52 4%	Agreed statement of facts	Los Angeles Wing nuts and valve cover wings
P81/89	Landis, J. June 11, 1981	Cal Custom Hawk et al.	75-2-00506, etc.	Item 648.97 11% Item 657.20 9.5%	Item 660.52 4%	Agreed statement of facts	Los Angeles Wing nuts

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/225	Rao, J. June 10, 1981	The Easterling Company	77-6-00992, etc.	Export value	Invoice unit values, net packed	Agreed statement of facts	Chicago Porcelain dinnerware and ashtrays
R81/226	Rao, J. June 10, 1981	Kent International	78-11-01966, etc.	Export value	F.o.b. prices set forth in invoices of Willing Co., Ltd., which accompany the involved entries	Agreed statement of facts	New York Bicycles
R81/227	Rao, J. June 10, 1981	Kent International	78-11-02082, etc.	Export value	F.o.b. prices set forth in invoices of Willing Industry Co., Ltd., which accompany the involved entries	Agreed statement of facts	New York; San Francisco; San Juan; Boston; Philadelphia Bicycles

R81/228	Re, C.J. June 11, 1981	Marubeni Iida (America) Inc.	75-7-01825	Export value	Unit values found by appraising customs official, less ocean freight and marine insurance, and without additions to said values for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Steel bars
R81/229	Re, C.J. June 11, 1981	Nichimen Co., Inc.	76-1-00258, etc	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Miscellaneous articles
R81/230	Rao, J. June 11, 1981	Micro-Mo Electronics, Inc.	80-11-00083	Export value	Unit invoice value from commercial invoices related to involved entries	Agreed statement of facts	Cleveland Miscellaneous articles
R81/231	Landis, J. June 11, 1981	Micro-Mo Electronics, Inc.	78-12-02110	Export value	Unit invoice value from commercial invoices related to involved entries	Agreed statement of facts	Cleveland Miscellaneous articles
R81/232	Landis, J. June 11, 1981	Micro-Mo Electronics, Inc.	79-7-01003	Export value	Unit invoice value from commercial invoices related to involved entries	Agreed statement of facts	Cleveland Miscellaneous articles
R81/233	Landis, J. June 11, 1981	Micro-Mo Electronics, Inc.	79-12-01804	Export value	Unit invoice value from commercial invoices related to involved entries	Agreed statement of facts	Cleveland Miscellaneous articles

Appeal to U.S. Court of Customs and Patent Appeals

APPEAL 81–17—The United States *v.* Miracle Exclusives, Inc.—GERMINATION TRAYS—AGRICULTURAL OR HORTICULTURAL IMPLEMENTS—SPROUTING TRAYS—BIOSNACK OR BIOSTA SPROUTERS—TSUS. Appeal From Slip Op. 81–16.

The merchandise in this case consists of plastic germination trays—horticultural implements—known as "Biosnack" or "Biosta" sprouters which were manufactured in Switzerland and Canada. The imported merchandise is used with water to sprout seeds, which are subsequently eaten, and consists of three trays, syphon caps, a catch basin, and a lid, composed of plastic. Upon entry into the United States, the merchandise was classified under Item 772.15, TSUS, as "Articles chiefly used for preparing, serving, or storing food or beverages, or food or beverage ingredients; and household articles not specially provided for; all the foregoing of rubber or plastics—Other," and assessed with duty at 11.5 per centum ad valorem or 8.5 per centum ad valorem, depending upon the date of entry.

Plaintiff-appellee claims that the merchandise is entitled to entry free of duty under Item 666.00, TSUS, as agricultural or horticultural implements not specially provided for. The United States Court of International Trade decided that the sprouting trays involved are horticultural implements entitled to entry free of duty under Item 666.00, TSUS, as claimed.

Defendant-appellant, being dissatisfied with the decision and judgment of the United States Court of International Trade, appeals to the United States Court of Customs and Patent Appeals, and respectfully prays pursuant to Section 1541(a) and 2601 (a) and (b), Title 28, United States Code, to review the questions involved therein and to grant such relief in the premises as to the Court shall seem just.

APPEAL 81–18—The United States *v.* Mast Industries, Inc.—WOMEN'S PANTS—OTHER WOMEN'S WEARING APPAREL NOT ORNAMENTED—BUTTONHOLING AND POCKET-SLITTING OPERATIONS—TSUS. Appeal From Slip Op. 81–21.

The merchandise in this case consists of precut fabric components of women's pants which were exported from the United States to El Salvador to be assembled into finished garments. In addition to sewing the components together, when the merchandise was being assembled in El Salvador, the components were subjected to buttonholing and/or pocket-slitting by the foreign assembler. Upon entry into the United States at the Port of Miami, Florida, the merchandise was classified on liquidation as "other women's, girls', or infants' wearing apparel, not ornamented: of cotton: not knit: other," and assessed with duty at the rate of 16.5 percent ad valorem under TSUS Item 382.33. The duty was assessed, pursuant to TSUS Item 807, on the full value of the merchandise less the cost or value of some of the components, which were products of the United States, and which were used in assembling the imported merchandise.

Plaintiff-appellee contested the decision of the Customs Service; specifically, for its failure to deduct from the full value of the imported pants, pursuant to TSUS Item 807, the cost or value of the United States components which were subjected to buttonholing and/or pocket slitting by the foreign assembler of the imported merchandise. In addition, plaintiff-appellee contended that the components in issue did not lose their physical identity in the imported articles by change in form, shape, or otherwise; nor did the components advance in value or improve in condition abroad except by operations which constitute assembly or which were incidental to the assembly process.

Based upon the evidence presented at the trial of the case, the United States Court of International Trade decided in favor of plaintiff-appellee, and judgment was entered accordingly.

Defendant-appellant, being dissatisfied with the decision and judgment of the United States Court of International Trade, appeals to the United States Court of Customs and Patent Appeals, and prays, pursuant to Sections 1541(a) and 2601 (a) and (b), Title 28, United States Code, to review the questions involved therein and to grant such relief in the premises as to the Court shall seem just.

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, JUNE 25, 1981

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

In the Matter of CERTAIN STABILIZED HULL UNITS AND COMPONENTS THEREOF AND SONAR UNITS UTILIZING SAID STABILIZED HULL UNITS	Investigation No.3 37–TA–103

Order

Pursuant to my authority as Chief Administrative Law Judge of this Commission, I hereby designate Administrative Law Judge Janet D. Saxon as Presiding Officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: June 10, 1981.

DONALD K. DUVALL,
Chief Administrative Law Judge.

Capers Imported in Bulk: Competitive Status Under Section 504(d) of the Trade Act of 1974

AGENCY: United States International Trade Commission.

ACTION: In accordance with the provisions of section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), the Commission has

instituted investigation No. 332–124 for the purpose of providing advice to the U.S. Trade Representative (USTR) on whether any article like or directly competitive with capers imported in bulk was produced in the United States on the date of enactment of the Trade Act of 1974 (hereinafter referred to as "the Act"). This advice is sought in connection with section 504(d) of the Act (19 U.S.C. 2464(d)).

EFFECTIVE DATE: June 9, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. John Reeder, Agriculture, Fisheries, and Forest Products Division, U.S. International Trade Commission, Washington, D.C. 20436 (Telephone 202–724–1754).

SUPPLEMENTAL INFORMATION: On May 22, 1981, pursuant to the authority of the President delegated to the USTR by Executive Order 11846, as amended by Executive Order 11947, the USTR requested certain advice on capers imported in bulk.

All capers, whether crude or processed and whether in bulk or packaged for retail sale, are covered by item 161.07 of the Tariff Schedules of the United States (TSUS). In advice provided to the President in investigation Nos. TA–131(b)–5, TA–503(a)–7, and 332–113 in February 1981, the Commission indicated that articles covered by TSUS item 161.07 are like or directly competitive with articles produced in the United States on the date of enactment of the Act (January 3, 1975). Therefore if the entire TSUS item 161.07 were designated as an eligible article under the U.S. Generalized System of Preferences, imports from any GSP-eligible country supplying 50 percent or more of the value of total caper imports would generally not receive duty-free treatment because of the "competitive-need" provisions of section 504(c)(1)(B) of the Act.

Section 504(d) of the Act exempts from section 504(c)(1)(B) articles for which no like or directly competitive article was being produced on January 3, 1975. The USTR has requested that the Commission determine whether any article like or directly competitive with capers imported in bulk, considered separately from all other forms of capers, was produced in the United States on January 3, 1975. If the Commission were to find that there were no such like or directly competitive products, then the competitive need limits of section 504(c)(1)(B) would generally not apply to any GSP-eligible country supplying 50 percent or more of the value of capers imported in bulk and such country would receive duty-free treatment.

WRITTEN SUBMISSIONS: While there is no public hearing scheduled for this study, written submissions from interested parties

are invited. Commercial or financial information which a party desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting confidential treatment must conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). All written submissions, except for confidential business information, will be made available for inspection by interested persons. To be ensured of consideration by the Commission in this study, written statements should be submitted at the earliest practicable date, but no later than July 10, 1981. All submissions should be addressed to the Secretary, United States International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

By order of the Commission.

Issued: June 10, 1981.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN CARD DATA IMPRINTERS AND COMPONENTS THEREOF } Investigation No. 337–TA–104

Order

Pursuant to my authority as Chief Administrative Law Judge of this Commission, I hereby designate Administrative Law Judge Janet D. Saxon as Presiding Officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: June 10, 1981.

DONALD K. DUVALL,
Chief Administrative Law Judge.

In the Matter of
CERTAIN AIRLESS PAINT SPRAY PUMPS AND COMPONENTS THEREOF } Investigation No. 337–TA–90

Commission Order

On November 17, 1980, the Commission instituted the above-referenced investigation to determine whether there is a violation of section 337(a) of the Tariff Act of 1930 (19 U.S.C. § 1337(a)) in

the importation into the United States of certain airless paint spray pumps and components thereof, or in their sale, by reason of the alleged infringement of U.S. Letters Patents 3,254,845 and 3,367,270 and U.S. Reissue Patent 29,055, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Notice of the Commission's investigation was published in the Federal Register of November 21, 1980. (45 F.R. 77190.)

During a hearing before the Administrative Law Judge (held on March 31, 1981, through April 2, 1981). Complainant Wagner Spray Tech Corp., presented testimony indicating that one Italian and four Japanese companies may be about to import allegedly infringing pumps into the United States in the near future. These and similarly situated companies may be vitally concerned with the outcome of this investigation and may wish to submit comments to the Commission on the issues of public interest and remedy. One or more of the parties to this investigation may be in a good position to identify interested nonparties so that the Commission may invite their comments at the appropriate time.

Accordingly, it is hereby ORDERED THAT—

1. The parties shall submit to the Commission by June 19, 1981, a list containing the names and addresses of companies and/or persons not a party to this investigation who may have relevant information to present to the Commission concerning the issues of violation, public interest and remedy, particularly those nonparties which may be on the verge of involvement in the importation of pumps alleged to infringe the patents in issue in this investigation; and

2. The Secretary shall serve a copy of this Order upon each party of record in this investigation.

By order of the Commission.

Issued: June 12, 1981.

KENNETH R. MASON,
Secretary.

In the Matter of CERTAIN WET MOTOR CIRCULATING PUMPS AND COMPONENTS THEREOF	Investigation No. 337–TA–94

Notice of Cancellation of Prehearing Conference and Hearing

Notice is hereby given that the prehearing conference and hearing scheduled for June 29, 1981 (46 Fed. Reg. 28770, May 28, 1981) are cancelled.

The Secretary shall publish this Notice in the Federal Register.

Issued: June 16, 1981.

JANET D. SAXON,
Administrative Law Judge.

In the Matter of
CERTAIN MODULAR PUSHBUTTON SWITCHES AND COMPONENTS THEREOF } Investigation No. 337–TA–96

Notice of Prehearing Conference and Hearing

Notice is hereby given that a prehearing conference will be held in this case at 9:00 a.m. on July 27, 1981, in the Dodge Center, Room 201, 1010 Wisconsin Avenue, N.W., Washington, D.C., and the hearing will commence immediately thereafter.

The purpose of the prehearing conference is to review the trial memoranda submitted by the parties, to stipulate exhibits into the record, and to discuss any questions raised by the parties relating to the hearing.

The Secretary shall publish this notice in the Federal Register.

Issued: June 17, 1981.

JANET D. SAXON,
Administrative Law Judge.

In the Matter of
CERTAIN SURFACE GRINDING MACHINES AND LITERATURE FOR THE PROMOTION THEREOF } Investigation No. 337–TA–95

Notice of Commission Request for Comments Regarding Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Request for public comment on proposed settlement agreements.

SUMMARY: The settlement agreements would result in the termination of the investigation as to respondents Bob's Machinery Sales and Cassiere Machinery Company. This notice requests comments from the public on the proposed settlement agreements within thirty (30) days of publication of this notice in the Federal Register.

DATES: Comments will be considered if received within 30 days of publication of this notice. Comments should conform with section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR § 201.8), and should be addressed to Kenneth R. Mason, Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

SUPPLEMENTARY INFORMATION: Complainant Brown and Sharpe Manufacturing Company and respondents Bob's Machinery Sales and Cassiere Machinery Company have moved jointly for termination of this investigation as to those respondents on the basis of settlement agreements. On May 21, 1981, the presiding officer recommended that the joint motions be granted.

Notice of the institution of the investigation was published in the Federal Register of January 22, 1981 (46 F.R. 7107).

SETTLEMENT AGREEMENTS: The two settlement agreements, which are identical except for the name of the respondent, provide in pertinent part as follows:

> Pending a determination by the U.S. International Trade Commission of the complaint filed in the investigation, RESPONDENT shall refrain from importing, buying, selling, leasing, or otherwise transferring Surface Grinding Machines into the United States directly or indirectly from Taiwan or other countries, of the type and style which
>
> (a) are reproductions, copies, colorable imitations or simulations of B&S High Precision Surface Grinding Machines that have been sold under the designations 510, 612, 618, 824, 1024, 1030, 1244, and 1236, or
>
> (b) are of the type offered for sale heretofore by Lian Feng Machine Co. of Taiwan, China, identified as Exhibit 14 attached to the B&S complaint in the investigation.
>
> RESPONDENT shall refrain from copying, reprinting, using, selling or distributing any unauthorized copies of manuals, catalogs, brochures, or other printed material prepared or owned by B&S and bearing a B&S copyright notice.
>
> RESPONDENT shall refrain from using any B&S manual, catalog, or other printed material, whether or not protected by copyright, in connection with the maintenance, repair or sale of surface grinding machines or components thereof, other than B&S surface grinding machines or components thereof.
>
> RESPONDENT shall refrain from importing, buying, selling or otherwise transferring Surface Grinding Machines made in foreign countries which simulate the trade dress of B&S High Precision Surface Grinding Machine sa sexemplified by Exhibits 14, 15, and 16B of the Complaint filed in the investigation.
>
> RESPONDENT agrees to give to B&S two copies of all catalogs, manuals, advertisements and promotional pieces promoting or making reference to surface grinding machines made by Lian

Feng Machine Co. that have been used, sold or distributed by RESPONDENT.

RESPONDENT shall deliver to B&S prior to March 27, 1981 in affidavit form a statement relating to RESPONDENT's purchase and sale of surface grinding machines made or sold by Lian Feng Machinery Co., including (a) the total number purchased; (b) the dates of purchase; (c) the price paid; (d) the total number in inventory; (e) the total number sold; (f) the price of each sale; (g) the date of each sale.

RESPONDENT shall deliver to B&S prior to March 27, 1981 all copies of catalogs, manuals and advertisements in its possession that were prepared by or for Lian Feng Machinery Co. that contain reference to surface grinding machines that are reproductions, copies, colorable imitations or simulations of B&S High Precision Surface Grinding Machines that have been sold under the designations 510, 612, 618, 824, 1024, 1030, 1244, and/or 1236.

B&S and the RESPONDENT agree to file a joint motion before the U.S. International Trade Commission to terminate the Investigation with respect to RESPONDENT without prejudice.

B&S agrees to refrain from instituting any civil action for any matter which have been raised in the complaint filed before the U.S. International Trade Commission.

B&S hereby releases the RESPONDENT from claims of copyright and trademark infringement and unfair competition arising from those issues raised in the B&S complaint filed in the Investigation.

WRITTEN COMMENTS REQUESTED: In order to discharge its statutory obligation to consider the public interest, the Commission seeks written comments from interested persons regarding the effects of terminating this investigation as to respondent Bob's Machinery Sales and Cassiere Machinery Company on the basis of the settlement arguments on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the United States, and (4) U.S. consumers. The Commission investigative attorney is specifically requested to make comments. All written comments must be filed with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register. In addition, pursuant to 19 C.F.R. § 210.14(a)(2), the Commission has requested comments from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service.

ADDITIONAL INFORMATION: The original and 19 copies of all written submissions must be filed with the Secretary to the Commission, 701 E Street NW., Washington, D.C. 20436, telephone (202) 523–0161. All comments must be filed no later than 30 days after publication of this notice in the Federal Register. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request *in camera* treatment. Such requests should

be directed to the Secretary to the Commission and must include a full statement of the reasons the Commission should grant such treatment. The Commission will either accept the submission in confidence or return it. All nonconfidential written submissions will be available for public inspection at the Secretary's office.

FOR FURTHER INFORMATION CONTACT: Clarease E. Mitchell, Esq., Office of the General Counsel, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone (202) 523–0148.

By order of the Commission.

Issued: June 17, 1981.

KENNETH R. MASON,
Secretary.

Investigation No. 731–TA–44 (Preliminary)

Sorbitol From France

AGENCY: United States International Trade Commission

ACTION: Institution of preliminary antidumping investigation.

SUMMARY: The U.S. International Trade Commission hereby gives notice of the institution of investigation No. 731–TA–44 (Preliminary) to determine whether there is reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from France of sorbitol, provided for in item 493.68 of the Tariff Schedules of the United States, which is allegedly sold or likely to be sold in the United States at less than fair value (LTFV).

EFFECTIVE DATE: June 19, 1981.

FOR FURTHER INFORMATION CONTACT: Ms. Miriam Bishop, Office of Investigations, U.S. International Trade Commission, Room 350, 701 E Street NW., Washington, D.C. 20436; telephone 202–523–0291.

SUPPLEMENTARY INFORMATION: On June 15, 1981, petitions were simultaneously filed with the U.S. Department of Commerce and the U.S. International Trade Commission by Pfizer Inc. alleging that sorbitol from France is being sold in the United States at LTFV and that an industry in the United States is being materially injured or threatened with material injury by reason of such imports. Accordingly, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)), the Commission is instituting preliminary antidumping investigation No. 731–TA–44 (Preliminary) to determine whether a

reasonable indication of such injury exists. The Commission must make its determination within 45 days after the date on which the petition was received, or in this case by July 30, 1981. The investigation will be conducted according to the provisions of part 207, subpart B, of the Commission's Rules of Practice and Procedure (19 CFR 207).

WRITTEN SUBMISSIONS: Any person may submit to the Commission a written statement of information pertinent to the subject of the investigation. A signed original and nineteen (19) true copies of each submission must be filed at the Office of the Secretary, U.S. International Trade Commission Building, 701 E Street, NW., Washington, D.C. 20436, on or before July 16, 1981. All written submissions except for confidential business data will be available for public inspection.

Any business information for which confidential treatment is desired shall be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6).

For further information concerning the conduct of the investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR 207), and part 201, subparts A through E (19 CFR 201).

CONFERENCE: The Director of Operations of the Commission has scheduled a conference in connection with this investigation for 10 a.m., e.d.t., on Monday, July 13, 1981, at the U.S. International Trade Commission Building. Parties wishing to participate in the conference should contact the investigator for this investigation, Ms. Miriam Bishop (202–523–0291). It is anticipated that parties in support of the petition for the imposition of antidumping duties and parties opposed to such petition will each be collectively allocated one (1) hour within which to make an oral presentation at the conference. Further details concerning the conduct of the conference will be provided by the investigator.

INSPECTION OF THE PETITION: The petition filed in this case is available for public inspection at the Office of the Secretary, U.S. International Trade Commission.

This notice is published pursuant to section 207.12 of the Commission's Rules of Practice and Procedure (19 CFR 207.12).

By order of the Commission.

Issued: June 19, 1981.

KENNETH R. MASON,
Secretary.

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U.S. Customs Service

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